IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONNIE C. RESHARD	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 02-1787
	:	
THE LANKENAU HOSPITAL, D/B/A, A/K/A MAIN LINE HEALTH, DR. MICHAEL J. GLASSNER, DR. JOHN SCHILLING, DR. MARK E. SCOTT, DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER AND DR. GEOFFREY P. TREMBLAY	:	

SURRICK, J. **APRIL 28, 2006**

MEMORANDUM & ORDER

Plaintiff, Connie C. Reshard, Esquire, a member of the Pennsylvania bar, brought this action pro se against six doctors and Lankenau Hospital, alleging medical malpractice in connection with a procedure that she underwent at Lankenau Hospital on April 4, 2000. For the following reasons, we will dismiss this case with prejudice for failure to prosecute.

I. BACKGROUND

Plaintiff is a practicing attorney and member of the Bar of the Commonwealth of Pennsylvania. Plaintiff's Complaint was filed on April 2, 2002. The case was assigned to the Honorable Robert F. Kelly. After disposing of several preliminary motions, Judge Kelly set discovery deadlines. Those deadlines had to be extended because of discovery disputes. In fact, the discovery process was punctuated by numerous disputes, several of which went to the Third Circuit. (COA Docket Nos. 03-1623; 03-1899.)

In addition to an unusual number of sanctions requests by all parties, Plaintiff sought recusal of Judge Kelly from the case. Plaintiff asserted that Judge Kelly's bias against her merited disqualification. While Judge Kelly found that the several motions for recusal were insufficient, he voluntarily recused himself, recognizing that "Plaintiff's various motions and issues regarding her disagreement with my decisions has aided in rendering this action over one year old with the filing of over 120 documents and motions." (Doc. No. 128 at 7-8.)

The case was reassigned to this Court on April 22, 2003. (Doc. No. 130.) Our first action was to deny all outstanding motions and start the discovery process anew. This decision was made in an attempt to avoid the prior discovery disputes and move the case forward efficiently. At that point, the case was eighteen months old and over 140 documents and motions had been filed, but no significant discovery had been undertaken.

On November 26, 2003, we held a Pretrial Conference in open court. Thereafter, as discussed at the conference, an Order was entered directing Defendants to allow Plaintiff to inspect the original Lankenau Hospital records at Lankenau Hospital and to provide Plaintiff with a date stamped copy of the records within two weeks. The Order also required Plaintiff to produce a statement within sixty (60) days from a qualified licensed professional or professionals indicating that the professionals believed that there was a reasonable probability that the care, skill, and knowledge exhibited by each defendant in the treatment of Plaintiff fell outside acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff. (Doc. No. 141.) We advised counsel that after the Court received this statement of merit, the depositions of Plaintiff and Defendants would be immediately scheduled and the case would be moved expeditiously to trial.

On December 1, 2003, Plaintiff filed four additional motions. (Doc. Nos. 142 ,144, 145, 148.) These motions requested nonrelevant information from the Court and sought to vacate the Court's previous orders. The motions again illustrated Plaintiff's intention to further prevent the movement of this case forward. In our Order dated December 31, 2003, we denied each of these motions. (Doc. No. 156.) Plaintiff appealed this Order, as well as our Orders of October 15, and November 26, 2003. (COA Docket No. 04-1273.) This was Plaintiffs third appeal in this case. On November 16, 2004, the Third Circuit dismissed the appeals for lack of jurisdiction. (Doc. No. 160.) Plaintiff still took no action with regard to our discovery Order. Pursuant to the Order of November 26, 2003, Defendant Lankenau Hospital scheduled an appointment with Plaintiff to allow her an opportunity to inspect all of the Hospital's records concerning her medical treatment. Defendant Bates stamped these documents and certified that they were complete. Plaintiff failed to appear to inspect the documents and did not call or e-mail to reschedule the appointment.

On February 20, 2004, we held a conference in court for the purpose of scheduling depositions and setting a trial date. The conference was scheduled to begin at 9:30 a.m. Plaintiff did not appear. At 10:00 a.m., we began the conference despite Plaintiff's absence. Plaintiff did not contact Chambers or Defense counsel to explain her absence or her failure to comply with our Order to produce a certification from a medical professional concerning the merits of her case. At the conclusion of the hearing, Defense counsel made an oral motion for sanctions pursuant to Fed. R. Civ. P. 37(b)(2)(C). Counsel asked that we dismiss the case with prejudice and award appropriate attorney's fees. In the alternative, Counsel asked that we renew Defendants' Motion for Summary Judgment. (Doc. No. 159 at 10.) Since that conference,

Plaintiff has not communicated with the Court, has not communicated with Defense counsel, and has done nothing to pursue this case.

II. DISMISSAL FOR FAILURE TO PROSECUTE

A. Legal Standard

Federal courts have an inherent power to dismiss with prejudice a plaintiff's action for lack of prosecution as a necessary sanction to prevent undue delays and to avoid congestion. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-31 (1962). This authority has been expressly recognized by Federal Rule of Civil Procedure 41(b): "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."[1] Fed. R. Civ. P. 41(b). In addition, it is well recognized that "[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31.

It is also clear that where a plaintiff fails to take action on a case for an extended period of time, the Court is entitled to dismiss for failure to prosecute. In *Shannon v. General Electric Co.*, 186 F.3d 186 (2d Cir. 1999), the Second Circuit stated:

> The only action [plaintiff] took during [a] nearly two-year period was to file an untimely notice of appeal of the court's 1996 order, which appeal was subsequently withdrawn for lack of jurisdiction. Those cases in which we have reversed dismissals for failure to prosecute have involved substantially shorter

[1] We note also that Local R. Civ. P. 41.1(a) allows the Court to eliminate abandoned actions from the court's calendar. The rule considers a case abandoned when it has been dormant for more than one year. *Id.; see also Young Jewish Leadership v. 939 HKH Corp.*, No. Civ. A. 93-2634, 2005 WL 2050440 (E.D. Pa. Aug. 23, 2005).

> delays than the one at issue here. Where, as here, "inaction and lethargy became the rule," we have not hesitated to affirm a district court's dismissal for failure to prosecute.

Id. at 194 (internal citations omitted). Similarly, the Third Circuit has made clear that district courts may exercise this power to dismiss and may, in fact, find that it is the only appropriate recourse when "confronted with litigants who flagrantly violate or ignore court orders." *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992); *see also Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683, 696 (3d Cir. 1988) (affirming dismissal as a Rule 37 sanction for failing to comply with discovery orders over an extended period of time); *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974) (upholding dismissal for failure to prosecute as appropriate under Rule 41(b) and pursuant to the inherent power of the court). Although "dismissal is a harsh remedy and should be resorted to only in extreme cases," *Mindek*, 964 F.2d at 1373 (quoting *Marshall*, 492 F.2d at 918), "[t]he district courts cannot, and should not, tolerate unjustifiable delays and expenditure of irreplaceable judicial resources caused by litigants, *pro-se* or represented, who will not obey court orders." *Id.* at 1375.

The Third Circuit has counseled that when considering whether it is appropriate to dismiss a case, courts should consider the six factors set forth in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984). Those factors are:

> (1) the extent of the party's personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal . . . and (6) *the meritoriousness* of the claim or defense.

Id. at 868. "The *Poulis* standard is not a mechanical calculation for deciding whether or not to dismiss a plaintiff's complaint, and not all of the Poulis factors need be satisfied in order to

dismiss a complaint. Rather, the decision whether or not to dismiss a claim under *Poulis* is a balancing test, that must be made in the context of the district court's extended contact with the litigant." *Smith ex rel. Ali v. Altegra Credit Co.*, No. 02-CV-8221, 2004 U.S. Dist. LEXIS 21478, at *12 (E.D. Pa., Sept. 22, 2004) (internal citations and quotations omitted). In addition, "when a litigant's conduct makes adjudication of the case impossible, such balancing under *Poulis* is unnecessary." *Sebrell v. Phila. Police Dep't*, 159 Fed. Appx. 371, 374 (3d Cir. 2005) (citing *Guyer v. Beard*, 907 F.2d 1424, 1429-30 (3d Cir. 1990).

B. Legal Analysis

In the instant case, Plaintiff has not taken any action in this matter in nearly two and a half years. To date, the only action Plaintiff has taken since December 19, 2003 was to file an unsuccessful interlocutory appeal in January 2004 and an unsuccessful appellate petition for rehearing in December 2004.[2] (Doc. No. 157.) Plaintiff has violated discovery orders, failed to appear at scheduled conferences with the Court, and failed to communicate with the Court or opposing counsel.

First, Plaintiff violated our November 26, 2003 discovery Order. In that Order we required Plaintiff to:

> provide this Court with a written signed statement from an appropriate licensed professional that, after review of the Lankenau Hospital records, the licensed professional believes that there exists a reasonable probability that the care, skill and knowledge exercised or exhibited in the treatment, practice or work that is the subject of the Plaintiff's Complaint fell outside acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff.

[2] This appeal was dismissed for lack of jurisdiction by the Third Circuit on November 16, 2004. (Doc. No. 160.) The petition for rehearing was denied by the Third Circuit on December 17, 2004. (COA Docket No. 03-1899.)

(Doc. No. 141.) With that instruction we warned that failure to comply with this Order would result in "the imposition of severe sanctions." (*Id.*) Plaintiff never produced any documents pertaining to her treatment nor did she provide a legitimate excuse for noncompliance. In addition, Plaintiff failed to appear for an appointment with Defendant to inspect relevant hospital records concerning her treatment and did not call Defense counsel to indicate that she could not make the appointment. (Doc. No. 159 at 3.) Finally, Plaintiff failed to appear at a scheduled hearing on February 20, 2004 and failed to communicate with the Court on that day or in the time since to provide a reason for not appearing. The purpose of that hearing was to schedule depositions in an effort to move the case forward after months of delays in discovery. Plaintiff's failure to appear and to communicate with the Court or Defense counsel has made it impossible to move the case forward.

In considering the *Poulis* factors, it is clear that dismissal is the only appropriate action in this matter. Plaintiff's failure to appear, failure to communicate with the Court or Defense counsel, and flagrant failure to comply with Court orders justifies the sanction of dismissal in this case. The docket reveals that Plaintiff has delayed and frivolously contested every step in the pre-trial process. Through the repeated use of frivolous appeals and periods of absolute inaction, this case has been ongoing for four years and only one deposition has been taken. In addition, the nearly two and a half years of total inaction and non-communication by the Plaintiff can no longer be countenanced.

Moreover, Defendants have been prejudiced by Plaintiff's delay. Numerous depositions have been rescheduled due to Plaintiff's failure to comply with previous scheduling orders. These tactics have cost Defendants significant resources. Defendants have also been required to

spend money on legal fees combating Plaintiff's motions concerning discovery and sanctions. As a result of the delay, Defendants have not yet even had an opportunity to physically examine Plaintiff and assess the extent of her alleged injuries and her claim as a whole.

Furthermore, alternative sanctions would not be feasible or effective in this case. Plaintiff has ignored court orders, failed to appear at depositions and court conferences, and has taken no action at all for almost two and a half years. Clearly, any alternative sanctions would be futile.

As a result of Plaintiff's conduct, it is difficult to assess the merits of her claims. However, all of the other *Poulis* factors militate in favor of dismissal in this case. Plaintiff's utter failure to communicate with the Court and to pursue this matter has made adjudication of the case impossible even without consideration of these factors. *See Sebrell*, 159 Fed. Appx. at 374. Accordingly, we are compelled to dismiss this case with prejudice.

An appropriate Order follows.

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ORDER

AND NOW, this 28th day of April, 2006, it is ORDERED that Plaintiff's complaint is DISMISSED with prejudice for failure to prosecute.

IT IS SO ORDERED.

BY THE COURT:

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R. Barclay Surrick, Judge